

# State of New Hampshire



PERSONNEL APPEALS BOARD  
54 Regional Drive, Unit 5  
Concord, New Hampshire 03301

## STATE OF NEW HAMPSHIRE PERSONNEL APPEALS BOARD

**TIFFANY HAWKINS V. NEW HAMPSHIRE VETERANS HOME**

**DOCKET # 2020-T-015**

**APPEARANCES:** The appellant appeared pro se.

Attorneys Michael Haley and Jill Perlow from the N.H. Department of Justice represented the State.

**ISSUES OF LAW:** Per-A 1002.02 – Dismissal during Initial Probationary Period;

Per-A: 1002.08 (b) (7) Violation of a Posted Agency Policy; and

Per-A 1003.01 through 1003.03 – Removal for Non-Disciplinary Reasons.

**WITNESSES:** Alice Leeming – Director of Human Resources,

Tina Gilbert – Supervisor of Ward Clerks.

**APPEAL HEARING:** The Board conducted an in-person appeal hearing at the offices of the NH Division of Personnel in Concord, N.H. on October 21, 2020.

**APPEAL TRIBUNAL:** A quorum of the Board sat on this appeal: Commissioner Gail Wilson, Commissioner Marilee Nihan and Attorney Norman Patenaude who served as presiding officer.

## **BACKGROUND**

The State dismissed the appellant for non-disciplinary reasons. She disagreed with that determination and requested a hearing to adjudicate the issue.

## **FINDINGS OF FACT**

The facts are drawn from the record, the pleadings, and the testimony of witnesses. The N.H. Veterans Home ("Home") hired the appellant to work as a Licensed Nursing Assistant ("LNA") on January 17, 2020. There is a one-year probationary period for State positions. Prior to that, she had worked for the Home on a per diem basis since June 2015. Standard shifts last 8 hours. The duties of an LNA involved direct patient care on the resident wards as well as activities performed at the nurses' station located at the crossroads of various residential wings. Prior to the Covid-19 epidemic, masking was always required by LNA's and nurses if needed because of residents' medical conditions.

In April 2020, the Covid-19 pandemic began to spread rapidly in the United States including New Hampshire. Residents in long-term care facilities were considered at a greater risk of infection because of their age and/or health. In response to the public health crisis and in reliance on guidelines issued by the US Center for Disease Control ("CDC") and the N.H. Department of Health and Human Services ("DHHS") for infection control, the Home promulgated a policy that required all residents and staff members to wear masks at all times anywhere in the building. Early in the implementation of the policy, the nursing home allowed staff to wear cloth masks. Once N-95 masks became available, those masks became the standard. The appellant wore her mask inappropriately without covering her nose and that practice placed the residents and staff at risk.

The appellant did not wear a mask when she sat at the nurses' station. On April 9, 2020 she was sent home before the end of her shift for not wearing a mask appropriately. Because of the mask mandate and her inability to wear one, the appellant chose to take advantage of a two-week emergency leave benefit. She returned to work at the expiration of that benefit on April 24, 2020. The appellant alleged that she could not wear a mask for an entire shift without experiencing complications, so administrators asked her to provide medical documentation to corroborate her claimed inability to wear one. The appellant was called back to work on April 22, 2020 with a start date of April 27, 2020 but was sent home early again on that day for not wearing a mask appropriately. Administrators asked her to provide medical documentation to corroborate her claimed inability to wear one.

The appellant contacted her primary care provider ("PCP") to request the necessary documentation to excuse her from wearing a mask. On April 27, 2020 Dr. Margaret Bahder sent an electronic mail message to the Human Resources Director at the Home. In that message Dr. Bahder revealed that the appellant suffered from chronic anxiety and depression and explained

that the appellant's anxiety was exacerbated by the extended use of a facial covering and that this condition prevented the appellant from working at the Home. In a second electronic mail message dated April 30, 2020, Dr. Bahder opined that that appellant was unable to wear a mask at all and that this condition was permanent. On May 1, 2020 administrators at the Home concluded that they could not accommodate the appellant's medical condition because the appellant was unable to perform the essential functions of her position that required wearing a mask. By voice mail message that same day the Home notified her of that fact and of their intent to initiate the termination process for non-disciplinary reasons by voicemail message that same day. At the intent to dismiss meeting held in the conference room on May 11, 2020 they asked her to provide additional medical documentation on different types of masks that might lend themselves to some accommodation in the workplace but the appellant did not produce any. The appellant responded that she was able to wear a mask. The administrators requested that she provide an updated physician's assessment indicating that, but the appellant was unable to do so in such a short timeframe. The administrators then went forward with the actual dismissal on May 31, 2020.

In its closing summation, the State reiterated the premise that the appellant failed to comply with an essential requirement of her job – wearing a mask during her shift at the nursing home during a public health emergency. Since her physician opined that there were medical reasons that rendered her incapable of complying with the mandate for wearing a mask, the State employer concluded that it could not accommodate that restriction due to the risk is placed on staff and residents at the nursing home. The State contended that it followed the rules for dismissing a probationary employee. It noted that the appellant wore a mask during the hearing that lasted for two hours and that it had not received any new medical evidence over the past five months that would cause it to reconsider its action. The State asked the Board to affirm its decision.

The appellant disputed some of the facts and argued that the State could have accommodated her limitation. Relevant disputes included the following points:

- She indicated that the infectious disease nurse suggested that the appellant remove her mask at the nurses' station. Affidavits were not provided to support that statement and nursing home witnesses indicated that they were not informed of that informal accommodation.
- She indicated at the appeal hearing that the reason she could not wear a mask throughout her shift was because she was pregnant which was a temporary condition. Testimony revealed that none of her supervisors knew this at the time and this condition was not consistent with the assessment from her physician.
- She indicated at her dismissal meeting on May 11, 2020 that she was given 24 hours to provide an updated physician's written assessment stating that she, in fact, could wear a mask. The appellant said that she attempted to contact her physician, however, due to

the pandemic and the short time frame, she had been unable to obtain one within 24 hours.

She asked the Board to reverse the State's decision.

### **CONCLUSIONS OF LAW**

In accordance with Administrative Rule Per-A 207.12, a probationary appellant carries the burden of proof and must establish by a preponderance of the evidence that the termination was arbitrary, illegal, capricious, or made in bad faith. Per-A 1002.02 allows an employer to dismiss an employee without prior warning at any time during the initial probationary period for failure to meet the work standard or for engaging in any conduct for which discipline is authorized including the violation of a posted or published agency policy under Per-A 1002.08 (7).

The appellant's full-time employment at the Home started on January 17, 2020 and was subject to a one-year probationary period. The Home is a residential long-term care facility for retired and disabled military veterans. Most of the residents are elderly and/or in poor health and more vulnerable to infectious diseases than the general population. Three months after it hired the appellant, the State closed all its administrative offices and buildings to the public because of an emergency response to the Covid-19 pandemic.

In response to the public health emergency and with guidance from the CDC and DHHS, the Home instituted a policy that required all staff and residents to wear facial masks at all times to arrest the spread of the virus. The appellant chose to either not wear a mask or to wear it incorrectly without covering her nose claiming that there were medical reasons for not complying with the policy. Administrative staff sent her home and asked her to provide a physician's note. The appellant's physician replied to the Home that the appellant suffered from chronic depression and anxiety that was exacerbated by covering her face and that this was a permanent condition. Following the receipt of this medical opinion Home administrators concluded that they could not safely accommodate the appellant's condition because of the constant interaction of staff and residents at the facility. They informed her of that conclusion and of their intent to dismiss her for non-disciplinary reasons unless, in accordance with Per-A 1003.02 (a), she could provide additional medical evidence that certain types of masks might be acceptable and compatible with her psychological conditions but she never provided any such evidence either at that time or at any other time in the ensuing months. The Board observed that the appellant wore a mask for the entirety of the two-hour hearing without expressing any adverse symptoms.

The appellant did not present any evidence to prove that the State's dismissal was arbitrary, illegal, capricious, or made in bad faith. Without the obligatory facial covering, the appellant was unable to perform the essential duties of direct patient care as an LNA and her non-

compliance placed the elderly residents and the other employees at risk of contracting the virus. The State followed the rules and enforced its policy in the interest of public health and safety. The Board takes administrative notice of the fact that the latest published statistics indicate that 80% of all deaths attributed to Covid-19 in the State of New Hampshire occurred in long-term care facilities. The Board concludes that the dismissal was warranted by the facts.

#### DECISION

Based on the evidence of record, the Board upholds the State's dismissal and denies the appeal.

This is a unanimous decision.



Commissioner Marilee Nihan



Commissioner Gail Wilson



Norman J. Patenaude, Esq.

Dated: November 18, 2020

